STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B175

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL TAYLOR,

Complainant,

vs.

GENERAL SUPPORT SERVICES,
CENTRAL SERVICES DIVISION,

Respondent.

Hearing was held on August 29, 1995, in Denver before Administrative Law Judge (ALJ) Margot W. Jones. Respondent appeared at the hearing through Maurice Knaizer, Assistant Attorney General. Complainant, Michael Taylor, appeared at the hearing pro se.

Respondent called Jon Goldstein and Jack Keene as witnesses to testify at hearing.

Complainant testified in his own behalf and called no other witnesses.

Respondent's exhibits 1 through 4 and 7 through 11 were admitted into evidence without objection. Respondent's exhibits 5, 6 and 12 were admitted into evidence over objection.

Complainant did not offer exhibits into evidence at hearing.

MATTER APPEALED

Complainant appeals the imposition of a disciplinary demotion.

ISSUES

1. Whether Complainant engaged in the conduct for which discipline was imposed.

2. Whether the conduct proven to have occurred constitutes grounds for the imposition of discipline.

3. Whether the decision to impose a disciplinary demotion was arbitrary, capricious or contrary to rule or law.

PRELIMINARY MATTERS

1. On August 18, 1995, Respondent filed a motion to preclude Complainant's witnesses and exhibits. The motion was considered at hearing on August 29, 1995. Respondent argued in the motion that Complainant's witnesses and exhibits should be precluded because Complainant did not file a prehearing statement prior to hearing identifying the witnesses and exhibits he intended to utilize at hearing. Respondent argued that it would be prejudiced if Complainant was permitted to call witnesses and present evidence which were not previously identified.

Complainant responded to the motion at hearing on August 29, 1995. Complainant argued that Respondent knew or should have known the witnesses and exhibits he intended to use at hearing. Complainant maintained that it would be a waste of his time to file a prehearing statement because the witnesses and exhibits that he intended to use at hearing was the same evidence that he used at the meeting held pursuant to State Personnel Board (Board) rule R8-3-3.

The records maintained by the Board reflect that Complainant filed his appeal of the disciplinary demotion on June 5, 1995. By notice dated June 13, 1995, the parties were advised that a hearing would be held in this matter on July 17, 1995. Pursuant to a June 13, 1995, prehearing order, the parties were directed to file a prehearing statement with the Board and the opposing party on or before June 27, 1995. Respondent filed its prehearing statement on June 27, 1995. Complainant did not file a prehearing statement.

On July 10, 1995, Respondent moved to continue the July 17, 1995, hearing date. The basis of Respondent's motion was the fact that Complainant did not file a prehearing statement. In the motion, Respondent asserts that because Complainant is pro se, it is more appropriate to continue the hearing than to impose sanctions on Complainant for failure to comply with the prehearing order.

Respondent's motion to continue the hearing date was granted on July 13, 1995. By notice dated July 24, 1995, the parties were advised that the hearing was continued to August 29, 1995. Thereafter, Complainant did not file a prehearing statement.

Respondent's motion to preclude witnesses and exhibits was granted based on the fact that Complainant's actions in failing to file a prehearing statement constituted gross negligence in the pursuit of his claim. Weiss v. Department of Public Safety, 847 P.2d 197, 200 (Colo. App. 1992).

2. Complainant moved to have Respondent's witnesses, Carla Anderson, Chuck Dieter and Mary Schade, and Respondent's exhibit

12 excluded from consideration at hearing. Complainant contended that the witnesses would not offer relevant testimony. Complainant further contended that exhibit 12 is an illegal wiretap under section 18-9-305, C.R.S. (1986 Repl. Vol. 8B). Complainant's motion was denied as a preliminary matter. The ALJ ruled that she would entertain Complainant's objections to witnesses and exhibits as the evidence was presented at hearing.

3. At hearing, Respondent's exhibit 12 was conditionally admitted into evidence. Complainant raised objection to the admission of the tape recording on the basis previously asserted as a preliminary matter, that it was an illegal wiretap under state law. Respondent asserted that it was not an illegal wiretap and that it is admissible as evidence at hearing. Respondent relied on Colorado Supreme Court decisions in cases entitled, People v. Rivera, 792 P.2d 786 (1990) and People v. Morton, 539 P.2d 1255 (1975), to support its contention that the exhibit was admissible into evidence at hearing.

Respondent's exhibit 12 is admitted into evidence over Complainant's objection on the grounds that it does not constitute an illegal wiretap under state law since it is a recording of a conversation obtained with the consent of the one of the parties to the conversation.

FINDINGS OF FACT

1. Complainant, Michael Taylor (Taylor), was employed by the collection unit, central services division of the Department of Administration, now known as General Support Services. Taylor was employed as a Collector II working under the supervision of Jon Goldstein. The appointing authority for Taylor's position was Jack Keene.

2. As a collector, Taylor was responsible for making phone calls to debtors of the State of Colorado. Taylor was also responsible for reviewing the debtors' files, skip tracings, building a picture of the debtors' ability to repay the debt, sending letters to debtors relevant to the debt owed to the state and motivating the debtor to repay the debt.

3. Taylor's job responsibility to motivate the debtor to repay the debt was a duty which was emphasized by the collection unit. Taylor's contacts with the debtor, either in person, on the phone or in writing, were required to be courteous, respectful and should be intended to motivate the debtor to repay the debt.

4. Taylor, along with the other collectors in the collection unit, received training. From 1993 to April 1995, Taylor received training on four occasions. In 1993, Taylor participated in a seminar presented to the unit concerning collection techniques.

The seminar covered issues related to phone technique and the contents of letters sent to the debtor. Emphasis was placed on the

importance of treating the debtor with dignity and being assertive and firm.

5. Taylor found the 1993 training seminar to be uninformative. He thought attending the seminar was a waste of time because it was tailored to debt collection in the private sector. Taylor's manner at the training seminar was uncooperative and disruptive. The trainer used role playing during the seminar to instruct the participants. Taylor volunteered to participate in the role playing, but made a mockery of it.

6. On an unspecified date after the 1993 seminar, the assistant attorney general, who was responsible for representing the state in collection matters, presented a seminar about choosing the debtors who would be sued by the state. During this seminar, Taylor was inattentive. Taylor's supervisor had to instruct him to stop making telephone calls during the presentation.

7. In April, 1995, another seminar was offered on dealing with difficult people. This seminar concentrated on how to diffuse situations with angry people. The seminar emphasized using positive language and treating the debtor with dignity. At this seminar, Taylor appeared to be cooperative and attentive.

8. In May, 1995, the assistant attorney general representing the state in collection matters presented another seminar to review a new law which was relevant to the collectors' duties.

9. Collectors are assigned accounts to manage. These accounts involve handling the debt collection for a state agency. Taylor was assigned a number of accounts during his five years of employment. Taylor managed the accounts for the University of Colorado Health Sciences Center, the University of Northern Colorado, the Department of Labor and Employment, and the Department of Revenue.

10. Taylor generally managed these accounts in a competent manner, realizing a significant amount of revenue for the state through the collection of debts. After Taylor was first employed with the unit, Taylor's supervisors were infrequently aware of complaints logged by the public against Taylor.

11. The supervisors substantiated some of the complaints. When the complaints were substantiated, Taylor was counselled about ways to improve his job performance. Other complaints were not founded or could not be substantiated, and therefore were not considered significant by the supervisors.

12. On April 24, 1994, Taylor received a corrective action for insubordination, failure to fully perform his work and his rude behavior during telephone calls with debtors. In January,

February and April, 1995, supervisors received additional complaints from debtors who were contacted by Taylor in the course of the performance of his job duties. These complaints concerned Taylor's rude treatment of the debtors during telephone conversations.

13. On June 16, 1995, Taylor attempted to contact a debtor by telephone. He was unable to reach the debtor, but he reached Richard Davis (Davis), a man who answered the phone at the number Taylor used to contact the debtor. Davis tape recorded the conversation. Following the telephone call, Davis contacted Goldstein, Taylor's supervisor, and complained about the rude manner that Taylor used in addressing him. Goldstein asked that Davis give him a copy of the tape. Approximately, 45 minutes after contacting Goldstein, Davis arrived at Goldstein's office with the tape recording.

14. The conversation between Taylor and Davis went, as follows:

Mr. Taylor: Edward Karsh

Mr. Davis: He isn't here. Who is this?

Mr. Taylor: This is the State calling, Department of Administration.

Mr. Davis: What's that mean? (Pause.) Hello?

Mr Taylor: What do you mean, What does that mean? This is the State government calling, Department of Administration.

Mr. Davis: Well, what is that? I don't understand.

Mr. Taylor: We want -- when will Mr. Karsh be back in?

Mr. Davis: I -- uh -- just a second, pal, he doesn't live here.

Mr. Taylor: (Inaudible.) pal, okay?

Mr. Davis: Well, that's for sure.

Mr Taylor: Okay?

Mr. Davis: You got that shit right.

Mr. Taylor: You best believe it G.[1]

[1] Complainant testified that "G" is a slang word for guy.

Mr. Davis: Yeah, he doesn't live --

Mr. Taylor: (Inaudible.) -- David if you'd like to.[2]

Mr. Davis: Pardon me?

Mr. Taylor: Come down (inaudible) see if that matters.

Mr. Davis: Hey, don't get smart with me, Bud. Look, he don't live here.

Mr. Taylor: Okay, that's all you have to say. Why are you questioning me?

Mr. Davis: Because I don't know what you're talk -- I don't know who you are.

Mr. Taylor: What difference does it make if I'm calling for Ed Karsh? He's either there or not. He either lives there or he does not.

Mr. Davis: Hey --

Mr. Taylor: It don't require you asking me why I'm calling you, because I didn't call to ask for you, if you're not him.

Mr. Davis: Well, I'm not him, so don't get smart with me.

Mr. Taylor: Oh --

Mr. Davis: What's your name?

Mr. Taylor: You're a real tough guy.

Mr. Davis: What's your name?

Mr. Davis: Hello?[3]

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[2] Complainant claims that at this point in the conversation he gave Davis his business address and invited him to come to the office to verify whether Taylor was employed by the State calling on official business.

Goldstein testified that he understood Taylor at this point in the conversation to be inviting Davis to the office to fight with him.

[3] Complainant challenges the accuracy of the tape recording of his conversation with Davis. Taylor claims that the tape was altered and that early in the conversation with Davis, Davis told Taylor that he was a "beaurcrat" who sat on his fat ass all day.

15. Taylor's tone of voice during the conversation with Davis on June 16, 1995, was harsh, aggressive and abusive.

16. Goldstein reviewed the contents of the taping recording with Jack Keene, the appointing authority. Keene decided to convene a Board rule, R8-3-3 meeting, to collect information to determine whether to impose disciplinary action on Taylor.

17. The R8-3-3 meeting was held with Taylor on May 8, 1995. Taylor explained that Davis altered the tape recording and to delete Davis' remark about beaurcrats. Taylor appeared to believe that Davis' remark about beaurcrats could be considered as provocation for his remarks to Davis.

18. Keene decided that disciplinary action was necessary in order to get Taylor's attention that his rude behavior toward debtors or other members of the public would not be tolerated. Keene decided that since Taylor had already been corrected, it was appropriate to impose a financial penalty. Keene decided to demote Taylor one pay grade for a one month period. This constituted an approximate $90.00 penalty.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on the agency in a disciplinary proceeding to prove by a preponderance of the evidence that the acts or omissions on which the discipline is based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen , 886 P.2d 700 (Colo. 1994).

Where there is conflicting testimony, the credibility of witnesses and the weight to be given their testimony is within the province of the ALJ. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987); Barrett v. University of Colorado Health Science Center, 851 P.2d 258 (Colo. App. 1993).

Respondent alleged that it proved by a preponderance of the evidence that Complainant engaged in the conduct for which discipline was imposed, that disciplinary action was warranted and that the decision to demote Complainant one step for one month was not arbitrary, capricious or contrary to rule or law.

Complainant contends that the penalty imposed in this matter is not the real issue. He argues that management should lead by example and the example set by Goldstein was equally as abusive of debtors as was Complainant's conduct. Complainant maintains that unit personnel should stick together and that the imposition of discipline was not appropriate. Further, Complainant argues that the tape recording of the telephone call upon which Respondent

relied in deciding to impose discipline did not accurately reflect the substance of the conversation. Complainant argues that the tape recording was altered and Davis made disparaging remarks about Complainant which provoked his remarks.

Respondent proved the allegations that formed the basis of the discipline. The discipline imposed was neither arbitrary, capricious, or contrary to rule or law because it was very lenient and was progressive. Complainant's contention that the tape recording was altered to delete remarks made by Davis which provoked his responses was considered by the ALJ and determined not to be mitigating evidence. Complainant's remarks on the telephone were inappropriate and unprofessional. No provocation would have justified the types of comments made by Complainant.

Respondent failed to reference the provision of the State Personnel Board rules which were violated by Complainant. Complainant does not challenge the disciplinary action on this basis. Respondent argued that Complainant's conduct constituted violation of Board rule 8-3(a).

CONCLUSIONS OF LAW

1. The evidence presented at hearing established that Complainant engaged in the conduct for which discipline was imposed.

2. The conduct proven to have occurred constituted grounds for disciplinary action.

3. The decision to demote Complainant one step for one month was neither arbitrary, capricious or contrary to rule or law.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

Dated this 11th day
of September, 1995.

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Margot W. Jones
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1.To abide by the decision of the Administrative Law Judge ("ALJ").

2.To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **$568.00**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is

due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the 11th day of September, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Michael Taylor
2728 Milwaukee St.
Denver, CO 80205

and to the respondent's representative in the interagency mail, addressed as follows:

Maurice Knaizer
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman St., 5th Floor
Denver, CO 80203

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